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**From:** Fishburn, Meredith  
**Sent:** Wednesday, June 3, 2020 3:39 AM  
**To:** Leefers, Kristin  
**Cc:** Roberts, Robert  
**Subject:** RE: advice on ATP settlement

Hi Kristin:

I agree with your thoughts on 17(d) but that's also within your discretion if you wanted to change the days to 20-30.

Regarding the rest of the email, I've cc'd Bob here in case there's more discussion to be had but I've cut and paste some information from him:

- [T]heir percentage payment offer may just be related to ATP (?) because it doesn't make sense from a lien standpoint. We can always force the sale of the property by filing a 107(l)(4) in rem action, in which case we would take all proceeds from the sale (up to the amount of our unreimbursed costs) through that action SO LONG AS there are no superior encumbrances on the property. They mention providing documentation on (v) the amount of any mortgages or security interests in the property so maybe that's at play here. **Maybe they are suggesting that there is a lien/encumbrance/mortgage superior to ours that would take some of the sale proceeds before our lien can be addressed.** Otherwise, I can only assume that they are making the offer on an ATP basis, perhaps arguing that they have other bills to pay so the remainder of the proceeds would have to go toward those. I'm not sure, without more context, but I'll say it seems odd (especially if there are no superior liens attached to the property).

Do you all know whether there are superior liens/encumbrance/mortgages to our claim?

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**From:** Leefers, Kristin <Leefers.Kristin@epa.gov>  
**Sent:** Wednesday, May 27, 2020 6:07 PM  
**To:** Fishburn, Meredith <Fishburn.Meredith@epa.gov>  
**Subject:** advice on ATP settlement

Hi Meredith,

I'm working with DOJ on a settlement at the Former Kaiser Smelter Site in Mead, Washington. We are following the ATP policy and using the 122(h) administrative settlement model, so I don't think we need to formally consult pursuant to the OSRE Roles Chart. However, I would like your input on a few proposed edits from the settling party. My questions relate to the standard language and proposed edits to the paragraph specifically related to the potential future sale of the property and paying net proceeds to EPA. I'd like your take on the proposed language from the settling party and any insights you have into other sites where parties have requested this type of edit. I've included the requested edits from the settling party to the end of this email. EPA/DOJ thoughts on the proposed edits are as follows:

17(d): Our inclination is to not include the suggested addition because we don't want to appear to commit EPA to a timeframe. The proposed language appears to be inspirational rather than binding, so we could possibly agree to it but with a longer timeframe such as 20 or 30 days.

17(e): We think the added language would already be covered in subparagraph 17(e)(ii) and therefore 17(e)(v) is not necessary. If we were to agree to add it though, I think we would want another appendix that lists all mortgages and security interests. We don't want money to be moved around in such a way that after the sale \$0 would come to EPA. I can't particularly enunciate how a mortgage would lead to that, but I can image attempts to avoid paying the government through private security interests (possibly the president or stockholders of the company) that would ensure those individuals are repaid prior to EPA.

17(f): Two issues here. First is the proposal to settle for 25% or \$100,000. The property was originally purchased for about \$1 million. It's current value is about \$550,000. EPA anticipates roughly \$5 million in unreimbursed response costs, but highly doubts the property value will ever rise to anywhere near that amount. DOJ has seen settlements like this for 50-75% but not as low as 25%. I'm talking with the team here in R10 as well, but would like your input as to whether there are any common amounts/percentages EPA typically agrees to. Also, if you have any guidance on how to evaluate the proposal so EPA can provide a counteroffer that would be helpful. I initially told the settling party that an EPA lien would have the value of the unreimbursed response costs of ~\$5 million, so I see that as our first offer. The second proposed edit in this subparagraph is the same language proposed in 17(e). We would treat proposed edits in both subparagraphs in the same manner.

Settling Party edits to paragraph 17 in yellow highlight:

d. If the proposed contract for the sale of all or a portion of the Property provides for Settling Party to receive all cash, is for at least 90% of the appraised value of the Property, and provides for the sale to occur within 60 days after the date of execution of the sales contract, then Settling Party may execute the contract without EPA's prior written approval. Otherwise, Settling Party shall provide to EPA a copy of the proposed sales contract, and must obtain EPA's written approval before executing the contract. EPA shall review the contract and provide written approval as soon as reasonably practicable, and shall endeavor to provide written approval within 10 days of submittal. Settling Party shall provide to EPA a copy of the executed contract within 7 days after signing the contract.

e. Settling Party shall submit to EPA, at least 10 days prior to the date of the sale of the Property, a notice of the sale, Settling Party's calculation of the net sales proceeds (as defined herein), and all documentation regarding the values used in the calculation, including: (i) copies of all documents to be executed regarding the sale; (ii) documentation of the amounts to be paid to holders of any liens listed as a Permitted Encumbrance in Appendix D; (iii) documentation of the amounts of closing costs to be paid; (iv) documentation of any broker's fees regarding the sale; (v) the amount of any mortgages or security interests in the property; and (vi) documentation of the amounts of State and/or municipal transfer taxes to be paid regarding the sale of the Property. Settling Party may request that EPA approve the calculation of net sales proceeds prior to the sale. In that event, EPA's approval shall be binding in any subsequent dispute between the United States and Settling Party regarding whether Settling Party has complied with Paragraph 17.f.

f. At the time of the sale, Settling Party shall pay to the United States 25 % of the net sales proceeds of the sale of the Property or \$100,000, whichever is less. "Net sales proceeds" shall mean, for purposes of this Paragraph, all consideration received by Settling Party from the sale of the Property, not including: (i) any payment in consideration of the release of any lien listed as a Permitted Encumbrance in Appendix D, hereto; (ii) any reasonable closing costs paid regarding the sale; (iii) any reasonable broker's fees regarding the sale; (iv) any payment in consideration of satisfying any mortgage or security interest in the property; and (v) any State and/or municipal transfer taxes regarding the sale. Provided that the amount of "net sales proceeds" is acceptable, EPA shall arrange for the execution or delivery, at the time of the sale, of a release of any federal lien regarding the Property.

Thanks for your help!

Kris

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